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Serving American Business as U.S. Affiliate of:

International Chamber of Commerce (ICC)
International Organisation of Employers (IOE)
Business and Industry Advisory Committee (BIAC) to the OECD
ATA Carnet System

“ALTERNATIVE DISPUTE RESOLUTION FOR CONSUMER TRANSACTIONS IN THE BORDERLESS ONLINE MARKETPLACE”

COMMENTS OF THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS (USCIB)¹

ONLINE ADR: THE BUSINESS COMMUNITY IS ACTING NOW!

*The USCIB and the international business community have long argued that effective self-regulation and alternative dispute resolution mechanisms are the best solutions to resolving consumer complaints online. **The international Business Community is acting now to bring credibility to this claim.** The creation of an effective online alternative dispute mechanism is essential to ensure consumer trust in online cross-border commerce. Business clearly recognizes that such trust is essential to ensure that business to consumer (b-to-c) electronic commerce meets its full potential.*

I. INTRODUCTION

The exponential growth of electronic commerce has resulted in a significant increase in cross-border transactions, making it possible for consumers and businesses of all sizes to purchase goods anywhere in the world with the stroke of a computer key. When a consumer logs onto the Internet and purchases a product from a company located in another country, a number of complex jurisdictional questions and conflicts of law issues could arise if either the consumer or the company with which he/she is transacting business experiences an unresolved complaint with the other.

II. WHY ONLINE ADR?

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USCIB advances the global interests of American business both at home and abroad. The USCIB has a membership of over 300 global corporations, professional firms, and business associations. It is the American affiliate of the International Chamber of Commerce (ICC), the Business and Industry Advisory Committee (BIAC) to the OECD, and the International Organisation of Employers (IOE). As such, it officially represents U.S. business positions in the main intergovernmental bodies, and vis-à-vis foreign business communities and their governments.

The USCIB and the International Chamber of Commerce (ICC), consistent with the principles for electronic commerce (1998) of the Business and Industry Advisory Committee (BIAC) to the Organization for Economic Cooperation and Development (OECD) and the Global Business Action Plan of the Alliance for Global Business, believe that electronic commerce cannot continue to grow if premature conclusions are made that do not address the practical realities and global nature of electronic commerce. Putting the brakes on e-commerce would be an enormous loss for business and consumers alike. The private sector is studying these issues very seriously on an expedited timetable. Such initiatives are taking into consideration the demands of the market and the unique circumstances of electronic commerce, ensuring their viability.

The Internet creates a global marketplace for goods and services and offers consumers greater choice, often at more favorable prices. Such choice could be greatly restricted if businesses are required to comply with a country of destination principle. In light of this recognition, the ICC has put forward the following positions:

- ***Tremendous Cost.*** Compliance with the laws of many different countries would impose tremendous costs on business and would be prohibitively expensive for small and medium-sized enterprises.
- ***Lack of certainty.*** Compliance with the country of destination principle would not provide businesses the certainty they need to offer their goods and services globally via the Internet. Under these circumstances, companies - especially SMEs - may simply forego cross-border online sales entirely, thereby reducing the benefits to consumers. The lack of certainty would be exacerbated if a consumer uses some form of "infomediary" or other interposing technology to purchase a good or service and pays with digital cash or any other payment mechanism that does not identify the purchaser. In such a situation, a business would never know the law and forum to which it is subjecting itself if a strict country of destination rule is always applied wherever the purchaser turns out to be an individual consumer. Mobile Internet access also introduces additional complexities regarding the situs of the transaction.
- ***Inability to enforce foreign judgments.*** Enforcement of foreign judgments or, more correctly, the inability to enforce foreign judgments, is an additional complication. Current international laws and treaties do not routinely provide, and are unlikely to provide even in the mid- and longer term, effective enforcement options for judgments obtained in a consumer's country of residence against a merchant in a foreign jurisdiction.² Are consumers offered transparent and effective protection if they have the benefit of their laws and courts, but are left unable to enforce a judgement against a business located in a foreign jurisdiction? Consumers would typically incur significant costs to bring a legal action, without assurance that they could enforce an ultimate judgment in their favor.³

² The Hague Conference on Private International Law has issued a Preliminary Draft convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters. This Preliminary Draft adopts the principle of country of destination for consumer matters.

³ These realities have recently been confirmed in a three-day experts meeting held on 2-4 September 1999 in Geneva by the Hague Conference on Private International Law.

In summary, electronic commerce will not be viable if transactions are potentially subject to each set of laws in the jurisdiction of every potential consumer, laws that vary greatly from one jurisdiction to another and may even be inconsistent.

The debate between the application of the principle of country-of-origin or country-of-destination in the context of jurisdiction and applicable law is ongoing. However, governments, business and consumer representatives have all embraced the role of online ADR as an effective means of resolving consumer complaints. In fact, the OECD, in its Guidelines for Consumer Protection in the Context of Electronic Commerce, recognizes that electronic commerce poses challenges to the existing framework for applicable law and jurisdiction.

Consistent with that recognition, the OECD member Governments call on “businesses, consumer representatives and governments to work together to continue to use and develop fair, effective and transparent self-regulatory and other policies and procedures, including alternative dispute resolution mechanisms to address consumer complaints and to resolve consumer disputes arising from business-to-consumer electronic commerce, with special attention to cross-border transactions.”

The USCIB applauds the efforts of the U.S. Government to promote effective online ADR as the appropriate means to resolve consumer complaints online.

The ICC and the business community have pledged to assure consumers and government representatives that where the principles of choice, self-regulation and country of origin are espoused, the mechanisms must be trustworthy, user-friendly and able to provide effective redress to the consumer.⁴ The ICC maintains that traditional consumer protection concepts are not very effective when indiscriminately applied to online transactions. Interactive technology, including the Internet, provides a unique opportunity for creating solutions that are both effective and that preserve the flexibility that underpins many of the emerging e-business models. The USCIB, ICC and BIAC are committed to engaging in an open dialogue with consumers and governments on ways to achieve progress on this issue. To this end, the ICC is co-organizing a workshop on online ADR with the OECD and the Hague Conference on Private International Law, scheduled for Fall 2000. BIAC has also proposed a joint workshop with the OECD and Consumers International on consumer protection more generally. The OECD Committee on Consumer Policy approved this proposal at its March 2000 meeting (the date and location have not yet been determined).

III. PRINCIPLES FOR AN EFFECTIVE ONLINE ADR MECHANISM

ADR is a mechanism by which parties to a transaction can attempt to resolve disputes outside of the traditional judicial process. In our view, the use of ADR mechanisms is appropriate once the parties take reasonable steps to exhaust company customer satisfaction procedures.

To put it simply, any effective online ADR mechanism must be quick, easy, cost effective, transparent and truly international to ensure the necessary consumer confidence and the long-term viability of the mechanism. More specifically:

⁴ This approach was set forth in a "Briefing Note on Jurisdiction and Applicable Law in Electronic Commerce" submitted at the November 4-5, 1999 hearing on the proposed revisions to the Rome and Brussels Conventions.

Quick and Easy: the mechanism must be easy for both the consumer and business to utilize and comply with the requisite procedures for filing and resolving a claim and expeditious to ensure the viability of the mechanism;

Cost Effective: any fees must be appropriate such that they do not dissuade consumers or businesses from utilizing the mechanism while, at the same time, ensuring the financial viability of the mechanism;

Transparent: any mechanism must ensure that the parties to a dispute have a meaningful opportunity to present their case and to participate in the process of the resolution of the dispute and should render decisions in such a way to develop precedence and consistency of decisions;

International: to be truly effective in the borderless online marketplace, any mechanism must be international in nature, ensuring effective resolution of disputes between parties in distant locations.

IV. THE CASE FOR AN ICC ROLE IN ONLINE ADR

The ICC International Court of Arbitration is a **robust model** that has been successful in the resolution of international disputes over the last 76 years. It is instructive to take from that example those elements that might prove useful in a future dispute resolution system for consumer to business transactions.

Among the many strengths of the ICC International Court of Arbitration is its global nature. To begin with, the ICC International Court of Arbitration is one of the few dispute resolution entities in the world that is truly international, in that it has no “home base”. While the Secretariat of the Court is headquartered in Paris, an ICC arbitration can take place anywhere in the world, and an examination of the Court’s statistics will illustrate that this is indeed the case. Unquestionably, it is the **international character** of the ICC that makes it so attractive to users from all over the world.

Secondly, the ICC International Court of Arbitration is a body composed of over 60 members, representing all the legal traditions and cultures from around the world. Thus, when a party submits a matter to the ICC, it can be sure that the matter under dispute will be subjected to scrutiny by a diverse group of **experts, who have had experience** with all manner and form of disputes. This scrutiny by the Court ensures that the parties receive a fair and complete adjudication of their dispute.

Thirdly, the ICC Rules of Arbitration and Conciliation are **extraordinarily flexible**, in that they are designed to accommodate parties from all legal systems in the world. Hence, the parties are free, if they so choose, to agree on which substantive and procedural law will apply, what the situs of the arbitration will be, who the arbitrators will be, and what, if any, discovery they will permit in the course of the arbitration. This flexibility is one of the factors that has caused **ICC arbitration to be the recognized leader** in international arbitration throughout the world.

Taken together, these elements are important, positive considerations in a consumer/business dispute resolution model. However, this is not to suggest that the ICC arbitration system be duplicated in the online world. Indeed, there are certain factors to be considered in a consumer/business model under the ICC International Rules of Arbitration as it presently exists.

For example, the current filing fee for an ICC Arbitration is \$2500, which makes it an unrealistic venue for many consumer to business disputes that typically involve smaller amounts of money. Secondly, although there are procedures in place whereby the parties can “fast-track” an arbitration, the typical ICC Arbitration lasts at least a year and sometimes longer, depending on the complexity of the dispute. Hence, both cost and speed would be factors that would work against the ICC Court of Arbitration as a model for b-to-c disputes. It will be necessary for the ICC Secretariat to explore ways in which this general process could be tailored to be effective for the particular needs of the online community.

V. MECHANISMS & MODELS

There are various existing models that might serve as building blocks for a comprehensive b-to-c dispute resolution system in the future (**Note: The list of models here is not meant to be exhaustive.**)

- **ICC International Centre for Expertise:**
The ICC International Centre for Expertise was created in 1976 to select competent experts upon the request of the parties in order to assist them in the resolution of disputes requiring special expertise, such as technical or financial matters. The parties can either agree in advance to submit a particular dispute to the Centre for Expertise, or they can agree to do so after a dispute has arisen. The Centre has a wide variety of experts available. Often, when experts are engaged in cases, both time and money are saved.
- **Cybertribunal:** The Centre de Recherche en Droit Public (CRDP) of the University of Montreal has developed an experimental project known as Cybertribunal. It seeks to assist parties in both the prevention and resolution of disputes arising in cyberspace. The service is designed to address the needs of both merchants and consumers. While the concept of Cybertribunal is clearly an interesting one, it remains to be seen if the parties will take advantage of such a service without knowing the identity or background of the decision makers. This illustrates one of the primary problems with many of the newly-developed dispute resolution mechanisms: *they lack the experience and name recognition of the long-established institutions such as the ICC.* Consumer confidence is a critical element in ensuring the success of any proposed dispute resolution mechanism.
- **Virtual Magistrate:** The Virtual Magistrate Project offers an arbitration process (not mediation) for the resolution of disputes between users of online systems who claim to be harmed by posted content and system operators. As with traditional arbitration, both parties must consent to the procedure. The types of complaints that can be submitted to the Virtual Magistrate are limited to such issues as copyright infringement, defamation and invasion of privacy. Again, while this concept is an interesting one, the scope of the subject matter of the disputes which can be addressed is limited and, once again, the parties are dealing with arbitrators that may be unknown to them.
- **Online Ombudsman:** The Online Ombuds Office (“OOO”) provides two types of assistance. First, the OOO allows users to search their web site to obtain information that is relevant to their particular dispute. Second, a party using the OOO can request the assistance of one of the online ombudspersons. While these online ombudspersons do not provide legal

advice, they can discuss strategies that a party might employ for the successful resolution of a dispute.

- **BBBonline:** BBBonline was established to help foster consumer trust and confidence in e-commerce. The BBBonline Privacy program offers a comprehensive assessment process that measures a company's ability to stand behind the promises it makes in its online privacy statement. BBBonline also provides for a dispute resolution process if a consumer has a concern over a privacy issue. Moreover, its Reliability Seal program, with 4500 companies, allows BBB member companies with an online presence to display a reliability seal showing that they are in compliance with all BBB standards for advertising and consumer protection. A consumer complaint is first handled by the business and, if unresolved, through ADR with a BBB mediator. Finally, the BBB program also handles between 30,000 and 40,000 disputes arising in the U.S., Japan and Europe against North American automobile manufacturers. This experience can be instructive in developing online ADR mechanisms.
- **TRUSTe:** TRUSTe is a well-known initiative under which consumers can resolve issues relating to their individual privacy rights and other consumer issues. The goal of TRUSTe is to foster consumer confidence in electronic commerce by allowing users to decide how their personally identifiable information will be used by a given web-site. Web site owners that wish to participate in the TRUSTe program sign a one-year contract with TRUSTe, which binds the user to certain privacy principles and provides for escalation procedures in the event a dispute cannot be resolved. TRUSTe reviews the contracting party's web site periodically to ensure that it complies with TRUSTe privacy principles. When a dispute arises between a consumer and a web site that carries the TRUSTe seal or trademark, a dispute resolution mechanism exists that enables TRUSTe to review and an escalate the dispute resolution process, if necessary.

VI. ROLE FOR GOVERNMENTS

At present, there are various state and federal laws in the United States (with counterparts in foreign jurisdictions) which regulate both domestic and international arbitration. Moreover, many jurisdictions have also adopted and/or drafted model laws regulating other forms of alternative dispute resolution. These laws may present barriers to a consumer online dispute resolution mechanism that will have to be addressed by governments. For example, there are jurisdictions that prohibit mandatory arbitration between consumers and businesses, and other jurisdictions which proscribe the categories of disputes which can be resolved by arbitration and/or alternative dispute resolution. In order to ensure that online alternative dispute resolution is viable, governments will have to examine and, where appropriate, amend these existing laws for potential conflict with the proposed online mechanism

The 1958 United Nations Convention on the Recognition and Enforcement of Arbitral Awards (The "New York Convention"), which has been signed by over 100 countries to permit the recognition and enforcement of arbitral awards in foreign jurisdictions, is supported by USCIB members and we oppose any attempt to reopen it. However, the Convention applies only to arbitral awards and, in as much as an online ADR mechanism is not based on an arbitration model, the convention would be inapplicable. Secondly, it contains certain requirements, such as evidence in writing of an agreement to arbitrate, which must be clarified and/or redefined outside of the

context of the Convention if the online mechanism in question calls for arbitration. Any new system must be in compliance with existing treaty/legal commitments, or new legislation must be enacted to ensure the respective countries' compliance with the law.

VII. CONCLUSION

Resolving the substantive nature of a party's dispute is a matter traditionally addressed by national judicial systems. While resolution by the Courts may have worked under more traditional business models, the Internet -- which has essentially eliminated the borders among the countries of the world -- poses new challenges. Moreover, as indicated above, judicial proceedings may not be an effective means of resolving an online consumer complaint given the small value of the transaction and the non-enforceability of foreign judgments.

The international business community is acting now through the ICC. The ICC is an ideal forum to address b-to-c online ADR mechanisms and is working with the Global Business Dialogue in this effort to identify issues of importance to business and to help promote mechanisms that are business-friendly and provide credible consumer online redress options. The ICC can leverage the expertise it has gained through the International Court of Arbitration and, as the World Business Organization, it can offer a truly international solution.

In fact, the ICC is currently examining its role as an international online alternative dispute resolution service provider and plans to submit a proposal to its National Committees in the near future based on the principles enumerated above. Any ICC model, as appropriate, will ensure cooperation among existing national and regional online alternative dispute resolution mechanisms.

We look forward to working with governments and consumer representatives to make international online ADR a reality that is effective for all stakeholders in the near future.